IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

No. 11553

BYRON W. WOOD,
Appellant,
VERSUS
PAUL GREIMANN,
Appellee.

Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division

BRIEF ON BEHALF OF APPELLANT, BYRON W. WOOD

CHARLES E. MCPHERREN,
Perrine Building,
Oklahoma City, Oklahoma,
Attorney for Appellant.

AUGUST, 1947

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

SUBJECT INDEX

PAGE

and the happening of which is a condition precedent to the operation of the instrument as a will, is so well settled as to require no supporting authority. From early times in England and the United States the distinction between contingent and general testamentary instruments has been clearly recognized.

2. The controlling rule is that where the language of the instrument clearly conditions its operation on the happening, or on the not happening, of any event or condition, the will is contingent and is inoperative and void where the event or condition does not occur.

3. The rule is also well settled that the test as to whether a testamentary instrument which refers to the probability of the death of the testator occurring under certain circumstances, or as the result of a certain event or peril, is to be adjudged contingent or general on the death of the testator, depends on whether the same were referred to as narrative and the inducement for making the will, in which event the will is not contingent on death occurring under the referred to circumstances, or whether the circumstances or events are referred to as the reason for making the particular dispositions and the circumstances are so related to each other that the one is dependent on the other, the will is contingent upon the occurrence of the said circumstances.

4. The above rules of construction and classification of testamentary instruments are equally applicable to writings in the form of wills as to letters in the nature of holographic wills, whether preserved by the author or by another, except that, as to letters, same being usually of a temporary nature, the facts and circumstances existing, and subsequently occurring, and the attitude and actions of the parties with relation to the letter after the referred to events failed to occur, are proper considerations.

PAGE

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

No. 11553

BYRON W. WOOD,
Appellant,
VERSUS
PAUL GREIMANN,
Appellee.

Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division

---

BRIEF ON BEHALF OF APPELLANT, BYRON W. WOOD

STATEMENT OF CASE, PLEADINGS, FACTS, DISCLOSING THE JURISDICTION OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS, AND THE PROCEEDINGS HAD AND ORDERS AND DECREES MADE AND ENTERED

This is an appeal by the appellant, Byron W. Wood, of Council Hill, Oklahoma, as heir and administrator of the estate of J. M. Pearl, deceased, whose true name was James Maurice Wood, and who died July 8, 1944, in the State of Oklahoma, to this Court from a judgment and decree of the District Court for the Fourth Judicial Division of the Territory of Alaska, reversing, setting aside and vacating an award of the United States Commissioner and *ex officio* probate judge of the Fairbanks District of the said Fourth Judicial Division, which revoked an order probating a purported letter dated September 26, 1931, in Washington, D. C., as the last will and testament of said J. M. Pearl, deceased, and admitting to probate said letter on the Petition of Appellee, Paul Greimann, as such last will and testament.

This statement of the case, pleadings, facts, proceedings, orders, judgments and decrees discloses the jurisdiction of the said Probate, District and the Circuit Court of Appeals, Ninth Circuit, to hear and determine the issues and questions presented in this cause and on this appeal under the provisions of the general Acts of Congress relating to the Territory of Alaska, and the Ninth Circuit Court of Appeals of the United States; Chapter CXLII of the Compiled Laws of Alaska 1933 (Sec. 3348-4571) and Chapter CXIX, Page 802, *et seq.*, said Compiled Laws, and Judicial Code, Section 128, 28 U.S.C.A., 225.

This proceeding had its inception in the filing of a Petition on the 20th day of February, 1945, by one Paul

Greimann, a resident of Fairbanks, Alaska, in the office of the said United States Commissioner and the *ex officio* probate judge, with a letter attached purporting to have been written by J. M. Pearl, deceased, dated September 26, 1931, in Washington, D. C., to the said Greimann and that said Pearl had died in Oklahoma, July 8, 1944, praying that the said letter be admitted to probate and declared to be the last will and testament of the said decedent , J. M. Pearl, and that the said petitioner be appointed administrator of the estate of the said J. M. Pearl, deceased, with will annexed (Tr. 2-6).

Said letter so written in Washington, D. C., and dated September 26, 1931, some 13 years prior to the death of said decedent, J. M. Pearl, while a resident of the State of Oklahoma, and attached to said petition, is in words and figures as follows:

Mount Alto Hospital, Washington, D. C.
2650 Wisconsin Ave. 9-26-31.

"Dear (Boy) Paul,—I had supposed that I would be quite a ways on my homeward bound journey by this time but fate deals elusively at times and handles our courses and actions in a curious and extremely decisive manner at times. I was discharged on Sept. 17th and expected to start home on the 18th but not having received the desired results at the Naval Hospital, Judge Wickersham and Dr. Cline head of the Veterans Bureau stopped the effect of my discharge and I was put in Mt. Alto Hosp. It almost takes an act of Congress to get in here but when Dr. Cline puts his stamp on your entry it is done, but usually it is most difficult to get him to acquiesce in it. Well, I am here and so much examining as I have gone thru has nearly worn

me out. Last Thursday I had the worst spell from several standpoints that I have ever had. The headache, breast-ache, and stomach nausea, a resultant of their co-operative aches were very severe and the almost complete blindness that came upon me lasted more than 12 hours the longest spell I have ever had.

* * *

"We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, *and in case I die if they do operate I bequeath you my belongings and property all except $100. to be given to Robert Galligher to help him in his education.* I would ask to be buried here in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of Oct. or soon after as they are going right after my case properly.

* * *

"With love & best wishes to all
As ever
DAD J. M. PEARL."

On March 6, 1945, the said probate court made and entered an order admitting said will to probate and appointing the said Paul Greimann administrator with will annexed (Tr. 7-9).

Thereafter appellant, Byron W. Wood, filed in the said probate court a Petition and an Amended Petition alleging said Byron W. Wood to be the brother and the duly appointed administrator of the said J. M. Pearl, deceased, whose true name was James Maurice Wood, and who died July 8th, 1944, a resident of Oklahoma, and praying that the said order probating the said letter as the last will and testament of said decedent, and appointing the said Paul Greimann administrator of said estate, be set aside and vacated and in support thereof, in substance, alleged:

1. That said letter alleged to be a will was purportedly written in Washington, District of Columbia, on September 26, 1931, and on its face and shows that it was not intended as a will, and was conditional, and was not executed in the manner required by the current laws of the District of Columbia alleged to be as follows:

> "All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses, or else they shall be utterly void and of no effect; and, moreover, no devise or bequest, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself or in his presence and by his direction and consent; but all devises and bequests shall remain and continue in force until the same be burned, canceled, torn, or obliterated by the testator or by his direction in the manner aforesaid, or unless the same be altered or revoked by some other will, testament, or codicil in writing, or other writing of the testator signed in the presence of at least two witnesses attesting the same, any former law or usage to the contrary notwithstanding. (March 3, 1901, 31 Stat. 1444, Ch. 854, § 1626.)" (6) (Tr. 11).

2. That Paul Greimann was not related to the said decedent, J. M. Pearl, and was not qualified for appointment as administrator of said estate; that the language and terms of the said letter, aside from the fact that same was not executed in the manner required by law, show that same was not intended as a will and was conditioned and contingent on the death of the said J. M. Pearl in the event of a contemplated operation at the hospital in Washington, D. C., in which he was a patient. The operation was not performed,

and the death of the decedent did not occur until some 13 years later and after the decedent had rejoined his wife and relatives and was a resident of Oklahoma (Tr. 11-13).

"That said petitioner is the duly qualified and acting administrator of the estate of the deceased Maurice O. W. Pearl, having been appointed by C. J. Blinn. Judge of the County Court of Oklahoma County, on the 31st day of July, 1945. A certified copy of the appointment is hereto attached marked 'Exhibit A' and made a part hereof, by reference (Tr. 13-18).

"Petitioner further alleges that his brother, J. Maurice Wood, known as Maurice Wood Pearl, also known as J. M. Pearl, was a veteran of the Spanish American War, was seventy-five years and sixteen days of age at the time of his death, which took place July 8, 1944, in the Veterans Hospital at Muskogee, Oklahoma, which the said deceased was a resident and inhabitant of the State of Oklahoma and was buried at Fort Gibson, Oklahoma on July 9, 1944.* *

"That at the time of the death of J. M. Pearl, also known as Maurice O. W. Pearl, he had a living wife whose name was Musetta Wood Pearl, and that both of them were residents and citizens of the State of Oklahoma, and that Section 107, Title 84, Ch. 2, Oklahoma Statutes Annotated, 1941, was in full force and effect and binding on all parties hereto. Which section is in words and figures as follows, to-wit:

> '107. *Effect of testator's marriage or issue to revocation.*
>
> 'If after having made a will, the testator marries and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survive him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will or in some way mentioned therein as to show an intention not to make such provision; and no (8) other evidence to rebut the presumption of such revocation can be

received. If, after making a will, the testator marries, and, the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will.'

"That Musetta Wood Pearl filed suit in the District Court of the State of Oklahoma, on May 9, 1927, naming Maurice Orpheus Wood Pearl as defendant, same being Cause Number 2631-D, thereafter obtained a judgment granting a divorce on June 30, 1927. Said judgment being based upon service by publication, and thereafter on May 7, 1942, motion to vacate and set aside the purported decree was filed in said cause, and on the said 7th day of May, 1942, by mutual consent and based upon competent evidence said decree of June 30, 1927, was by the District Court of the State of Oklahoma, duly vacated, set aside and held for naught. From that time to the death of J. M. Pearl, also known as Maurice O. W. Pearl, he and Musetta Wood Pearl, were husband and wife, and lived and cohabited together as such in the State of Oklahoma.

"That there is no law in Alaska authorizing the disposal of property by a holographic will and the only way provided by the laws and statutes of Alaska for the making of a valid will are Sections 4611, 4612 and 4640, Compiled Laws of Alaska, and neither of these statutes has been complied with, and the writing offered for probate herein is void and not sufficient as a will or testament under the laws of the District of Columbia, the State of Oklahoma or the Territory of Alaska" (Tr. 13-16, incl.).

A Motion to Dismiss said Amended Petition of said Wood as administrator and heir of said estate of J. M. Pearl, deceased, and a Demurrer to said Amended Petition were filed by the said Paul Greimann as administrator with will annexed and same were overruled by the said probate court on January 5, 1946 (Tr. 19-24).

Answer of Paul Greimann, administrator with will annexed, to said Amended Petition in material part, in substance, alleges:

> "* * that on the 26th day of September, 1931, said J. M. Pearl was, and had been for many years prior thereto, a *bona fide* resident and inhabitant of the Territory of Alaska and had his legal domicile therein, and had no property, real or personal, in the District of Columbia" (Tr. 29-30).

Admits that he is not a relative of J. M. Pearl, deceased, and was never adopted by said decedent; also alleges,

> "That said Paul Greimann, ever since he was of the age of eighteen years, in Chicago, Illinois, had been the intimate friend, and for many years in Fairbanks, Alaska, was, the business associate, of said decedent, J. M. Pearl; that this close friendship continued unbroken up to the time decedent left Fairbanks in December, 1941; * *
>
> "That said decedent during the month of December, 1941, left Fairbanks, Alaska, to secure needed medical attention in the States; that he never abandoned his permanent domicile in the Territory of Alaska, and upon leaving the Territory at the time aforesaid, he fully intended to return to Alaska, and continued in such intention as long as he lived; that shortly after leaving Fairbanks, Alaska, he suffered a stroke of paralysis and became mentally incompetent and was thereby prevented from returning to his home in Fairbanks, Alaska" (Tr. 31-32).

Order and decree of the probate court revoking and setting aside order admitting said letter to probate and denying said letter probation as the will of the said J. M. Pearl (Tr. 35-38).

Notice of Appeal of proponent, Paul Greimann, from order and decree of the probate court revoking and setting aside order theretofore made probating said letter and denying said letter probate as the last will of J. M. Pearl, deceased (Tr. 38-39).

Exceptions of Paul Greimann to order and decree revoking said order probating said letter and denying probation thereto as the will of said J. M. Pearl, deceased (Tr. 40-43).

Decree of the District Court of the Territory of Alaska, Fourth Division

On October 14, 1946 the said District Court made and entered a decree finding and concluding in material part as follows:

"Wherefore, by virtue of the law and the premises,

"It is Hereby Ordered, Adjudged, and Decreed: That the letter dated 9-26-31 written by J. M. Pearl, decedent above named, in his own handwriting, signed by him, and mailed by him from Washington, D. C., on September 27, 1931, addressed to Paul Greimann, Fairbanks, Alaska, is the true and valid Last Will and Testament of said decedent, J. M. Pearl, and is entitled to probate as such under the laws of Alaska, as heretofore adjudicated on the 6th day of March, 1945, (62) by the Probate Court for the Fairbanks Precinct, Alaska; and said Probate Court is hereby ordered to reinstate said adjudication of March 6, 1945;

"It is Further Ordered, Adjudged, and Decreed That the Order and Decree of said Probate Court made and entered on the 24th day of July, 1946, in the above entitled probate proceeding pending in said Probate Court, numbered 1019, revoking, vacating, and setting aside said Order of March 6, 1945, admitting said letter to probate as the last will and testament of said decedent, J. M. Pearl, upon the ground that said letter

was invalid as an absolute will of decedent and was merely a contingent or conditional Will in its terms and intent, be, and the same is hereby, vacated, set aside, and held for naught.

"It is Further Ordered, Adjudged, and Decreed That the finding and decree of said Probate Court to the effect that said letter is a conditional will and is of no legal force or effect as a last will and testament and, therefore, not entitled to probate as the last will and testament of said J. M. Pearl, deceased, be, and the same is hereby, reversed and set aside" (Tr. 44-45).

Notice of Appeal to the Circuit Court of Appeals, Ninth Circuit, on the part of the said Byron W. Wood

On October 21, 1946, said Byron W. Wood filed notice of an appeal from the said decree in material part as follows:

"I.

"That the Court erred in decreeing a letter dated 9/26/31, written by J. M. Pearl to be the true and valid Last Will and Testament of J. M. Pearl, Deceased, and entitled to probate under the laws of the Territory of Alaska.

"II.

"That the Court erred in vacating and setting aside that certain order of the Probate Court in the said cause, which said order of the probate Court held that the letter, dated 9-26-31 written by J. M. Pearl was a contingent or conditional will and not entitled to probate as the Last Will and Testament of the said decedent, J. M. Pearl (64).

"III.

"That the Court erred in reversing and setting aside the findings and decree of said probate court to the effect that the said letter was a conditional or contin-

gent will and was of no legal force and effect as the Last Will and Testament of J. M. Pearl" (Tr. 47-48).

Filing of Petition for and Allowance of Appeal to the Circuit Court of Appeals

On December 19, 1946, said Byron W. Wood duly filed a Petition for Allowance of Appeal and appeal was allowed from the said decree to the said Circuit Court of Appeals, and appeal bond fixed, filed and approved, and in the order allowing said appeal it is directed:

> "* * * that a certified transcript of records, proceedings, orders, judgment, testimony, and all other proceedings in said matter on which said decree appealed from is based, be transferred, duly authenticated to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before thirty (30) days from this date, to be heard at San Francisco, California,* * *" (Tr. 50).

On June 8th, 1947 by order of a judge of the Circuit Court of Appeals, Ninth Circuit, said time in which the record on appeal should be deposited with the clerk of said Circuit Court of Appeals was enlarged so as to include the first day of March, 1947 (Tr. 53-54).

Assignments of Error on Said Appeal

On February 6, 1947 said appellant, Byron W. Wood, filed Assignments of Error in material substance as follows:

> 1. That said District Court erred in taking jurisdiction on said appeal on the part of Paul Greimann from the order of the Probate Court revoking and setting aside the probation of the said letter as the Last Will

and Testament of decedent for the reason that the said order and judgment of the Probate Court had become final and no appeal was properly taken therefrom.

2. "That the Court erred in taking jurisdiction of this case as on appeal when no appeal was properly taken from the Judgment and Decree of the Probate Court under date of July 24, 1946, by anyone having authority or right to take an appeal" (Tr. 55).

3. That the District Court erred in taking jurisdiction on said appeal for the reason that on said purported appeal the record from the Probate Court to the District Court "was insufficient to confer on said Court appellate jurisdiction in this to-wit: *The record contemplated by the Compiled Laws of Alaska, 1933, to be filed in the United States District Court on Appeals, in Probate cases Chapter CLIV Section 4571, 4572, 4573, 4574 was never complied with as (73) the record did not contain the following documents and instruments upon which the United States Commissioner based her judgment of July 24, 1946 on, to-wit:*

"a. The Depositions of Byron W. Wood, Lesta L. Fitch and H. C. Fitch taken in Oklahoma City, Oklahoma, in this cause in which it was established by the uncontradicted testimony that Mr. J. M. Pearl, now deceased, was living with his wife in Oklahoma City for quite some time before he died.

"b. The certified copy of the judgment of the District Court of Oklahoma County, Oklahoma, showing that the divorce decree between the now deceased, J. M. Pearl, and Musetta Wood Pearl, his wife, had been vacated and set aside, restoring them as man and wife; which decree was dated 7th day of May, 1942;

"c. Certified and authenticated copy of the Laws of the District of Columbia as introduced in the trial before the United States Commissioner in this case; which acts controlled the making of wills in the District of Columbia.

"d. The certified copy of the death certificate.

"e. The certified copies of the Letters of Administration issued to Byron W. Wood, by the County Court of Oklahoma County, Oklahoma, in the estate of Maurice O. W. Pearl, who it is shown to be the same man as J. M. Pearl, dated in Oklahoma County July 31, 1945" (Tr. 55-57).

4. That the District Court erred in said decree reversing the said order and judgment of the Probate Judge in which the said Probate Judge found and concluded that the said purported letter heretofore admitted to probate is not an absolute Will and Testament of the said decedent, J. M. Pearl, and is of no legal force or effect and is not entitled to probate. (A copy of the said Order and Judgment of the said Probate Court is inserted in this Assignment.)

5. That said District Court further erred in making and entering said Decree of October 14, 1946, which reversed said above Order and Judgment of the said Probate Court, denying probate of the said letter and erred in finding and concluding that the said letter should be so probated (Tr. 58-60). (A copy of the said Decree of the District Court is inserted in this Assignment.)

Bill of Exceptions

On February 6, 1947 the appellant lodged and filed herein appellant's Bill of Exceptions specifying the same Assignments of Error as are set forth in Appellant's Assignments of Error (Tr. 55-61; Pages 12-13 *supra,* this brief). [Attached as exhibits and parts of said Bill of Exceptions are copies of the said Decree of the said District Court (Tr. 73-75)]; Notice of Appeal; Petition for Appeal; Order Allowing Appeal, and Order Extending Time to File Record and Docket Case on Appeal (Tr. 76-83).

The said Bill of Exceptions contained the following material evidence of Paul Greimann stated in narrative form:

"That he knew J. M. Pearl, the deceased first back about 1919, in Chicago, Illinois. Formed a friendship with him. Was associated with him up to 1930, was acquainted with him three years before coming to Alaska. Came to Fairbanks together, opened up the Pearl and Pearl Garage.

"Mr. Pearl was about 19 years older than the witness. The witness was about forty-three years old when Mr. Pearl died. He continued his friendship with him during his lifetime in Fairbanks. He lived out here on a farm that was bought by both he and I from Harry J. Busby in the winter of 1924, and owned by J. M. Pearl up to the time the army took it away from him here six years ago, or five years ago. *In 1930 we had a dissolution of partnership.* I bought out his equity in the Standard Garage and bought out the property on the corner of Lacey Street between First and Second. I transferred to him half of the 318-acre farm out there, which he contributed to the purchase thereof. I transferred to him one-half of the 318 acres, which is about three-quarters of a mile from Fairbanks. He lived there. Built a home there. It was taken over by the United States Army.

"He left here to go to the States about six years ago, about the first of November. He was in ill health. He went to Oklahoma. Received a letter from him from Council Hill, Oklahoma, stating that he had gone to Council Hill. We had always been on friendly terms. I used to go back and forth to his place out on the farm, and he used to come into the business whenever he came into town to say 'hello,' sometimes he stayed an hour or so. He still regarded me in a friendly manner, and I regarded him the same way. I think it was through my recommendation that he left. He wasn't looking any too good and said he wasn't feeling good. I told him I didn't see any reason why he should stay up here in the cold weather in the winter, and I says

'why don't you pack up your clothes and go outside for the winter?' That was the last trip outside. He went outside in 1931 for medical attention. He was in a hospital in Washington, D.C. He was a veteran of the Spanish-American War. After he was released from the hospital he came back to Fairbanks.

"In September I received a communication from him, a letter through the mail, addressed to Paul Greimann, that letter is what this proceeding is based on.

"He had no relatives here in Alaska. The only relatives that he had was, that he made mention of, was his brother Byron. That I never had any dealings with Byron Wood.

"That I based my claim to the estate on this letter.

"That this letter was in the handwriting of J. M. Pearl. That he and Pearl were in the garage business from '24 conducted under the name of Pearl and Pearl for some time. He suggested that I adopt his name. He called me son. I never adopted the name of Pearl, was always known as Greimann. We were always very friendly except when I got married, he disapproved of my getting married. 'He thought I should have asked him to get married, and there was a little dissension between he and I at that time.' 'However, while he never cared much for my wife, or liked my wife very well, so far as that was concerned I think we were always on friendly terms.' No open break between us. When I got the letter above referred to I put it in my safe in the garage. When he died I waited some time to see if anybody would be appointed to take care of his estate before application was made. 'I figured that if he was in Council Hill and his brother was there that he must have—I at least thought that I would have had some kind of a wish or some kind of a tip that he wanted his brother to handle it, so I figured that at any time we might receive that notice, so therefore I never entered into it until there wasn't anything showed up.

"His was farm land separated off in lots and some being sold for homes out there. He was engaged in the

real estate business to the extent of selling a portion of his property that he had acquired personally.

"On cross-examination by Mr. Taylor. He testified that he was no relation to J. M. Pearl. That as he recalled Mr. Pearl returned to Fairbanks the next spring after he went out for medical attention in 1931. Don't recall that he ever said anything about the letter he had written, relied upon here as a will. That Mr. Pearl told him he had a wife living in Oklahoma. He also said he was divorced. He came back to Fairbanks in '32. He assumed jurisdiction and control of his property from then on up until the time he left. He did seek me for advice at times, but he made the final disposition of anything pertaining to his affairs. He advised me about having a brother in Oklahoma at Council Hill. Mr. Pearl never advised the witness that the divorce decree was set aside and of his resuming martial relationship with his wife.

"I believe he died July 8, 1944. That he relied upon the part of the letter that states, 'and in case I die if they do operate I bequeath you my belongings and property,' to be the last will and testament. He was not operated on at that time and couldn't, then, have died from the operation. He died from paralysis in 1944. We divided the 318-acres of land, he took his half and I took mine. He assigned over his interest down *were* the garage was to me; that was in 1930.

"On redirect examination of Mr. Greimann by the Court: He testified that he and Mr. Pearl came to Alaska, in 1923, established a home here in Fairbanks and voted at the elections. He never *abandon* that home to the knowledge of the witness. When he went outside to the hospital he said he would be back as soon as he—he came back and continued to vote at the elections.

"The next time he went out was 1940. He had had a slight stroke a couple of years before that and his health wasn't any too good, and he would have to pack the wood out there, and so forth, out there on the ranch, and I said, 'there is no use of you staying here.

You have plenty to take care of yourself. Why don't you go outside?' And he said, 'I don't know but what I will do that.' He said, 'It will save a lot of anxiety,' and then, he says, 'nobody will have to come out and be looking after me all of the time in the wintertime to see that I have plenty of fuel.' So about a week after that he left. He left his home and everything here. I heard from *his* later, he said he intended to come back the following spring. He said he had bought a small house and small track of land, about five acres in Oklahoma. That it was nice and warm out there, and that he was enjoying the climate very much, but that he would be back in the spring. That would be the spring of 1941. It appears that he took sick shortly after he wrote this letter because I didn't receive any communications from him afterwards, with the exceptions of a postcard of some scene around Oklahoma City. He ask me why I didn't write; he hadn't heard from me for a long time; and that was the last communication I received. I never kept either one of them. I think the next I heard was through Mr. Clegg here, that he was ill. That was about three years ago this summer.

"When I got back from the outside I learned of his death on July 8.

"He had property in Alaska when he wrote the letter in 1931, and had property here at the time of his death. The property had been taken by the army at the time of his death and money had been deposited in Court in payment of it; around $10,000.00. They had taken the land in 1941. The only part of the estate that existed here was the money deposited in the Court. I never made inquiries about the Oklahoma property.

"On cross-examination of Mr. Greimann by Mr. Taylor: He testified that he didn't know that he resided in the State of Oklahoma with his wife. He didn't return to the Territory of Alaska. I think he was in a veteran's hospital in Muskogee.

"On further examination of Mr. Greimann by the Court: He testified 'that he died in a Veteran's Hospital in Muskogee, Oklahoma. He went in there shortly after he left Alaska, must have been some time in the spring of 1941. He *know* my children and was fond of them. It was his habit to give them a dollar on their birthday, if he knew when it was or if it was mentioned. He continued to call me 'son' always or 'Paul, boy.'

"In the letter above mentioned he called me, 'Dear Paul, boy,' and he signed it as 'J. M. Pearl' or 'Dad,' because I always called him 'Dad,' sometimes he signed it just 'Dad,' and this letter was signed dad and J. M. Pearl.

"Further cross-examination of Mr. Greiman by Mr. Taylor: That sometimes he signed J. M. Pearl and sometimes J. M. O. W. That he was in the probate court in Fairbanks when the depositions were read" (Tr. 66 to 73).

Said Bill of Exceptions set forth recitals, rules of the District Court of Alaska, and statutes as follows:

"XIV.

"Thereafter, and on the ____ day of February, 1947, this appellant, Byron W. Wood, filed Assignments of Error, which are incorporated in the Transcript and made a part of this Bill of Exceptions by reference as fully as if set out herein.

"XV.

"On the 19th day of December, 1946, Appeal Bond was duly filed herein and is set out in the Transcript of the Record and made a part of this Bill of Exceptions by reference as fully as if set out.

Praecipe for Transcript of Record and Citation to Paul Greimann to Appear and Defend herein in the District

Court, Ninth Circuit, and Return of Service thereon filed February 21, 1947 (Tr. 86 to 90).

Transcript properly certified setting forth all of the above filed February 24, 1947 in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit (Tr. 95-96).

SPECIFICATION OF ERRORS AND STATEMENT OF POINTS OR PROPOSITIONS RELIED UPON FOR REVERSAL

1. That the District Court of Alaska, 4th Division, erred in setting aside and vacating the order and judgment of the Probate Court, which denied the probation of said letter written by J. M. Pearl, deceased, to Paul Greimann and in decreeing that the said letter should be probated as the will of the said J. M. Pearl, deceased.

2. That the District Court of Alaska, 4th Division, erred in holding that said letter propounded herein as the will of the said J. M. Pearl, deceased, was general and not contingent, and that its operation as a will was not contingent on the death of the author as the result of the impending operation.

3. That the letter propounded herein for probate as the will of the said J. M. Pearl, deceased, shows on its face that it was written in a hospital in Washington, D.C., to the proponent, Paul Greimann, in Fairbanks, Alaska, and dated September 26, 1931, at which time said Pearl was a patient in said hospital, and an immediate operation on said Pearl was planned, and with regard to the said opera-

tion said Pearl wrote said Greimann "In case I die if they do operate, I bequeath my belongings and property," etc., "I would ask to be buried in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of October, or soon after," etc., and as appears from the said letter the said bequest and request were contingent and conditional upon the death of the said Pearl resulting from the said impending operation, and it appearing from the record herein, and it being admitted, that the operation was not performed, and that the said Pearl did not die from any operation but survived thereafter 13 years, said letter was not entitled to probate and the said District Court of Alaska erred in setting aside and vacating said order and judgment of the Probate Court denying the probation of the said letter and in decreeing that the said letter be probated as the will of the said J. M. Pearl, deceased.

The above three specifications, being closely related, and supported by the same reasoning and authorities, will be discussed together to save burdening this brief with repetition.

The task presented in the case at bar, being the consideration of the pertinent and controlling language of the letter, and applying thereto the above stated well settled rules in determining as to whether the letter should be held to be a contingent will, and not entitled to probation, it is obvious that a thorough and careful study and analysis of said language of the letter ranks first.

MATERIAL PARTS OF THE LETTER PROPOUNDED AS A WILL

Said letter shows on its face that it was written to the proponent in Fairbanks, Alaska, from a hospital in Washington, D.C., on September 26, 1931, where the author was a patient, and at the time an operation was planned and impending. The letter set forth at length the author's ailments, symptoms, attending physicians, and the necessity for the performance of the operation, and in reference thereto states:

> "We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, *and in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher to help him in his education. I would ask to be buried here in Arlington Cemetery.* I do not expect to die but to be on my way home by the 20th of Oct. or soon after as they are going right after my case properly" (Tr. 5-6). (See letter in full pages 4-6 Transcript.)

As is alleged in the pleadings of both parties, and admitted, the author of the letter was not operated upon, and did not die, and shortly after writing the letter returned to his home in Alaska where he remained and engaged in business for approximately ten years and then returned to his former home in Oklahoma in 1941, and thereafter remained in Oklahoma and died in Oklahoma on July 8, 1944, some thirteen years after the said letter was written.

In said letter the directly and clearly stated contingency or condition precedent to the operation of the letter as a testamentary instrument was *"In case I die if they do operate I bequeath you my belongings,"* etc., *"I would ask*

to be buried in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of October, or soon after." It is obvious that this bequest and request were provisional and contingent upon the two stated conditions or events. It is clear that the bequest was not immediately in effect. The author of the letter did not write that he thereby bequeathed his property without condition, but specifically conditioned the gift to be operative *"In case I die if they do operate."* This letter cannot by any reasonable interpretation be made to speak of the time of the death of the author when it occurs 13 years later under changed conditions. The urge for writing the letter was the impending operation and the language used specifically expressed conditions precedent to its operation. These conditions or events did not occur and the letter never became effective as a will.

POINTS AND PROPOSITIONS IN RELATION TO THE ABOVE SPECIFICATIONS

1. The letter presented for probate as a will shows on its face that it was written by J. M. Pearl in a hospital in Washington, D.C., to the proponent, Paul Greimann in Fairbanks, Alaska, and dated September 26, 1931, at which time said Pearl was a patient in said hospital, and said letter specifically detailed Pearl's afflictions and treatment and advised that an operation was impending, and with regard to the said crisis said Pearl wrote said Greimann: *"in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher*

to help him in his education. I would ask to be buried in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of Oct. or soon after as they are going right after my case properly"; that said bequests and requests were contingent and conditioned upon the death of the said Pearl resulting from said impending operation; and it appearing from the record herein, and being admitted, that the operation was not performed, and that the said Pearl did not die from any operation, but survived and lived thereafter for some 13 years, and died in the State of Oklahoma, the said District Court of Alaska erred in setting aside and vacating said order and judgment of the Probate Court denying the probation of the said letter and in decreeing that said letter be probated as the will of the said J. M. Pearl.

2. The District Court erred in vacating and setting aside the order and decree of said Probate Court denying probate to the said letter so presented for probate and decreeing that the said letter be probated as the will of the said J. M. Pearl, deceased, in that the said letter shows on its face that same was written to said Paul Greimann in a crisis and not intended as a general will, and that the gifts therein mentioned to said Greimann and Robert Gallagher were clearly contingent and to be operative only in the event the impending operation on the author of the letter was performed and caused the death of the author; that said planned immediate operation was not performed, and the author recovered and returned to his home in Alaska

and resided in Alaska some 10 years, engaging in business there, and thereafter removed to the State of Oklahoma and resided in Oklahoma approximately three years before his death; *and that neither the author of the said letter nor the said Greimann or Gallagher referred to or mentioned the said letter during the said thirteen years.*

PERTINENT CONTROLLING PRINCIPLES AND RULES AS TO CONSTRUCTION AND CLASSIFICATION OF TESTAMENTARY INSTRUMENTS

1. That a contingent will is one which is dependent on a stated contingent event or condition, and the happening of which is a condition precedent to the operation of the instrument as a will, is so well settled as to require no supporting authority. From early times in England and the United States the distinction between contingent and general testamentary instruments has been clearly recognized.

2. The controlling rule is that where the language of the instrument clearly conditions its operation on the happening, or on the not happening, of any event or condition, the will is contingent and is inoperative or void where the event or condition does not occur.

3. The rule is also well settled that the test as to whether a testamentary instrument which refers to the probability of the death of the testator occurring under certain circumstances, or as the result of a certain event or peril, is to be adjudged contingent or general on the death of the testator, depends on whether the same were referred

to as narrative and the inducement for making the will, in which event the will is not contingent on death occurring under the referred to circumstances, or whether the circumstances or events are referred to as the reason for making the particular dispositions and the circumstances are so related to each other that the one is dependent on the other, the will is contingent upon the occurrence of the said circumstances.

4. The above rules of construction and classification of testamentary instruments are equally applicable to writings in the form of wills as to letters in the nature of holographic wills, whether preserved by the author or by another, except that, as to letters, same being usually of a temporary nature, the facts and circumstances existing, and subsequently occurring, and the attitude and actions of the parties with relation to the letter after the referred to events failed to occur, are proper considerations.

5. The rule of presumption against intestacy cannot be used to justify a revision of the clear language of a testamentary instrument.

While, as is stated in many of the authorities, the distinction and classification of testamentary instruments, as to being contingent or general, depends upon the language of each particular instrument, and while two such instruments seldom are perfectly identical in language, the examination of the opinions of the courts analyzing and construing the language of and classifying such instruments should prove helpful in the case at bar. In that belief the

leading authorities most nearly in point are hereinafter cited, quoted and applied.

In *Dougherty* v. *Holscheider*, 88 S.W.(Tex.), 1113, two letters were proponded for probate and the lower court admitted and ordered same probated; however, on appeal the Circuit Court of Appeals reversed the decree and refused probation. As appears from the opinion Raf Welder wrote said two letters to J. R. Dougherty, which were in material part as follows:

"Hebronville, 4-12-1902.

"* * * Friend Jim, I am going to start to Montery to-morrow to have a surgical operation performed on me, and possibly I may never get back alive. I will write you full particulars as to what to do with my stuff when I get there. *The doctors have said that it would not be dangerous;* but, in case anything should happen, I want you to see to what I have left. * * *

"Monterey, Mexico, 5-6-1902.

"Mr. James R. Dougherty, Beeville, Texas—Friend Jim: I wrote you some weeks ago, and told you that I intended undergoing an operation, and that before doing so that *I would write you and tell you what to do with my stuff, in case anything happened to me. I expect to be operated on tomorrow.* * * * *While I don't anticipate any danger,* as the Dr. has assured me that there is no danger, yet *there might be,* and I think this will fully explain to you my wishes. * * *"

The probation was protested on the ground that the contingency did not arise. Raf Welder did not die as the result of the operation and not until about two years after the letters were written. In the opinion it is further stated:

"* * * The letters written by Raf Welder to J. R. Dougherty have the essentials necessary to constitute

a will under the statute, and, *unless the will was to take effect only upon the fatal termination of the operation referred to therein, it should have been probated by the district court.*

"A will which is to become effective only upon the happening of a contingency is a contingent will, and in case the contingency does not arise is by the failure of the happening of the event annulled and revoked. There are numerous cases, English and American, involving the construction of wills in which contingencies were expressed, for it seems to be very common for those unlearned in the law, who write their own wills, to do so under the influence of the fear or expectation of imminent peril and consequent death; but an infallible guide for their construction is difficult to be evolved therefrom. The current of modern authority, however, seems to be that, if the happening of the event is merely referred to as giving the reason or inducement for the making of the will, it be held unconditional; *but, if it appears that the testator intended to dispose of his property in case of the happening of the named event, then it will be held to be conditional.* * * *"

After citing and quoting from English and Federal and State cases wherein the language of the instrument was "if I never get back" or "should anything happen to me," without referring to any specific event or occurrence as a condition precedent, the court distinguishes such cases from the case being decided and quoted the above set forth controlling language of the letters limiting the operation of same as the result of the operation referred to, just as did the letter in the case at bar and concluded that the letters were contingent as follows:

"* * * *We think the words of the letter indicate clearly that it was written merely as an expedient in case of death resulting from the operation.* In both

letters he desires certain things done 'in case anything happened,' evidently in connection with the operation. The words bring it clearly within the purview of cases holding that the wills were contingent on the happening of certain events. *Morrow's Appeal* (Pa.), 9 Atl. 660, 2 Am. St. Rep. 616, in which the authorities are cited."

The will construed in *Phelps* v. *Ashton* (1867) 30 Tex. 344, commenced as follows:

"Know all men by these presents that I, H. C. Ashton, Sr., being on the eve of leaving home for an indefinite time, and not knowing what Providence may ordain during my absence, do make and will this request in case of my death while absent."

The court held that this was a contingent will, and hence inoperative where the testator died at home, or after his return from the proposed absence.

In *Ferguson* v. *Ferguson,* 45 S.W.(2d) (Sup. Ct. Tex.) 1096, relied upon by the appellee, the holdings in the above Texas and other cases cited herein are approved, but the court holds the language was not contingent as clearly appears in the opinion. The language of the will in this *Ferguson case* was:

"Haskell, Texas, May 5, 1924.

"I am going on a journey and I may never come back alive so I make this Will, but I expect to make changes if I live."

The court held that said language was not contingent as follows:

"The decision of this case must mainly turn upon the construction to be placed upon the first sentence which reads: 'I am going on a journey and I may never

come back alive so I make this will, but I expect to make changes if I live,' and the second sentence, which reads: 'First, I want a Hospital built in Haskell in memory of my husband Francis Marion to cost $50,000 (Fifty Thousand Dollars), if I live I expect to have it done myself.'

"There is no express provision that the will shall be contingent upon the death of the testatrix upon the particular journey referred to. If this intention existed in the mind of the testatrix and was carried into the will, it must be gathered mainly from a construction of the two sentences mentioned. * * *"

After in substance stating the controlling principles and rules of construction and classification of testamentary instruments to be in substance as stated above, the court further stated and held:

"Mrs. Morton did not say in her will: 'This Will is to be effective if I die on this trip.' She refers to it as her 'Last Will,' and makes the following bequests: * * * etc.,

"This was the 'Will' in which she 'expected' to make 'changes' if she 'lived.' *The making of changes in a written paper called a will presupposes the continued existence of the paper as a will.* One cannot 'change' something that has ceased to exist. Mrs. Morton was going on a journey; she did not want to die intestate. She wrote unskillfully a document and called it her will, and notified the world that she expected to change it if she 'lived'; *not that if she returned alive from the trip she intended to die intestate unless she wrote another will, or that upon her safe return this will would be null and void.* * * * The declaration by the testatrix that she 'expected' to make 'changes' is not equivalent to declaring the will null and void if she survived the journey or that it was contingent upon her death on that trip. This declaration indicates that she had published a will, the details of which did not exactly suit her, and she pro-

posed to change these details and possibly put the document in better legal form.

"These conclusions do not conflict with *Dougherty* v. *Holscheider,* 40 Tex. Civ. App. 31, 88 S.W. 1113, 1114, *Vickery* v. *Hobbs,* 21 Tex. 571, 73 Am. Dec. 238 , or *Phelps* v. *Ashton,* 30 Tex. 345, and in our opinion the conclusion reached by a majority of the Court of Civil Appeals results from an incorrect application of the principles announced in those cases to the language of Mrs. Morton's will. It was said in the *Doughtery case*:

" 'In most of the cases holding wills dependent on the happening of the condition named, the words, "if I never get back," referring to a certain journey, or "should anything happen to me," referring to a particular time or event, were used.'

"There are no express words expressing a condition in Mrs. Morton's will such as: 'If I die on this trip,' 'If anything happens,' or the like. Not containing the words of condition, her will does not fall within the rule announced in the *Dougherty case* where the words were 'in case anything should happen.' * * *"

It is obvious that the opinion in this *Ferguson case* approves the holdings in the cases of *Dougherty* v. *Holscheider, Vickery* v. *Hobbs,* and *Phelps* v. *Ashton,* presented in this brief on Pages 26-27, *supra.*

The opinion in *In re: Forquer's Estate,* 216 Pa. 331, 66 Atl. 92, was relied upon by the appellee in the case at bar as supporting the probation of the letter here involved; *however when the material difference in the language of the letters is considered and said opinion and supporting authority cited therein are analyzed the holding therein is to the contrary.* The instrument presented in the case for probate was a letter, and the narrative and induce-

ment stated by the testator is in substance such as usually appears in wills, being. "I intend starting tomorrow to Bozeman, Mont.—knowing the uncertainty and risk of the journey, know all persons that I do hereby will and bequeath all my property," etc., "and should anything befall me while away *or that I should die,* then in that event all my estate * * * are hereby assigned, conveyed and set over to my wife * * *."

After stating the applicable rules of construction to be in substance that, if the inducement stated in the will is simply referred to as the occasion for making the will at that time; that if the language used in the will can be reasonably construed that the testator refers to a possible danger as the occasion and not the reason for making the will; the will is not contingent and that to render a will contingent or conditional it must appear from the language that it was to only operate in the event of the occurrence of a said event, the court illustrated the application of said rules by citing and discussing cases as follows:

> " 'Reference to a few of the many cases cited by counsel will indicate how those rules, have been applied by the courts. In *Todd's Will,* 2 Watts & S. 145, written in contemplation of a journey, as follows,' 'My wish, desire and intention now is that if I should not return (which I will, no preventing Providence) what I own shall be divided as follows,' etc., it was held that, on his return and subsequent death, the will was contingent. In *Hamilton Estate,* 74 Pa. 69, the language, 'Should I die before the first of March, 1873,' etc., was held to be the expression of a contingency which prevented the operation of the instrument after the event failed to happen. *In Morrow's Appeal, 116 Pa. 440, 9 Atl. 660, 2 Am. St. Rep.*

616, (See Pp. 35-38 Ante) Morrow when about to go from home, wrote and signed a testamentary paper, beginning as follows: 'I am going to town with my drill and i aint feeling good and in case i shoulddend get back do as I say on this paper,' etc. He returned, but died soon afterward in the same illness. The will was held to be contingent. * *In *Magee et al.* v. *McNeil,* 41 Miss. 17, 90 Am. Dec. 354, the will of a soldier in the Confederate army contained the following expression: 'If I never return home I want all I have to be my wife's.' On his return and subsequent death the will was held to be contingent. In *Damon* v. *Damon,* 90 Mass. 192, the will contained the following: 'I, J. W. D., being about to go to Cuba, and knowing the danger of voyages, do hereby make this my last will,' etc. 'First: If by casualty or otherwise, I should lose my life during the voyage, I give and bequeath to my wife, A.,' etc. He then went on to give other specific devises. Held, conditional as to first clause of the will. In all the foregoing cases it will be observed that the contingent character of the instrument or devise stands out clearly.

" 'Adverting to some of the cases in which wills claimed to be contingent have been held not to be so, the following may be noted: In the Goods of George Thorne, 4 Swab. & Trist. 36, the will, dated at the Gold Coast of Africa in 1863, contained the following: 'Be this known to all concerned: I request that in the event of my death while serving in this horrid climate or any accident happening to me, I leave and bequeath to my beloved wife,' etc. 'I consider that every person should be prepared for the worst and especially in such a treacherous climate as this, which is considered one of the worst in the world, which has compelled me to write this letter.' It was held not contingent on the death on the Gold Coast. * * * In *Tarver* v. *Tarver,* 34 U.S. 174, 9 L. ed. 91, the will begins as follows: 'Being about to travel a considerable distance and knowing the uncertainty of life, think it advisable to make some disposition of my estate,' etc. Held not contingent. * * * In *Likefield* v. *Likefield,* 82 Ky. 589, 56 Am. Rep. 908, the language, 'If any

accident should happen me that I die from home, my wife, J. A. L., shall have everything I possess,' was held to render the will inoperative or contingent. * * *

"Applying these rules to the will of William A. Forquer, it may be observed, we think, *that its first portion contains no hint that its provisions were in any way contingent.* * * *

" '* * * Can the will as a whole, by any reasonable interpretation, be made to speak as of the time of testator's death whenever it might occur; or does it, *on the other hand, clearly appear from the will itself that it was only intended to become of effect in the event of testator's death during his contemplated journey?* These reasons impel us to a conclusion in favor of the former proposition. These are: (1) Testator's evident solicitude for his wife, apparent in the will. (2) We do not think that the contingency expressed in the will was intended to undo or destroy the absolute character of the dispositions already made therein. (3) The language used to express the contingency does not clearly lead to the conclusion that it was intended to render the will contingent in its operation. It may, on the other hand, be reasonably construed in favor of an absolute will. * * *

"'* * * In the case before us the language expressive of the contingency is, 'and should anything befall me while away or that I should die,' etc. *The expression 'should anything befall me while away,' standing alone, is clearly contingent.* It evidently refers to the possible death of the testator while away, as no other event could befall him which would give effect to the disposition of his estate which he was then making. The testator would have expressed the same thought had he said, 'and should death overtake me while away.' It clearly refers to his possible death while on his journey. We may well suppose that the testator, by the disjunctive expression which follows, *'or that I should die,' meant to add something to what he had already said. He had already provided for the con-*

tingency of death while on the journey. We may assume that he meant to add something by the use of the language which followed, and, if so, that he meant to make provision against the event of his death whenever it might occur. By the use of the disjunctive 'or,' the provision which follows excludes the thought that immediately preceded, and has, we think, the same force and meaning as if it stood alone. * * *''

It will be noted that the holding in *Morrow's Appeal, Ante,* Pages 36-38, also a Pennsylvania case, and other cases in point in the case at bar are approved. It will be further noted that the case of *Tarver* v. *Tarver,* 9 Pet. 174, 9 L. ed. 91, also relied upon by appellant is not in point. In this *Tarver case* the will propounded was duly executed on May 3, 1919 and contained the opening statement:

" 'Will. In the name of God, amen! Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament. * * *' "

Said Richard Tarver died in 1927. While several other questions were raised and discussed in the opinion the portion of the opinion relative to the question here presented as to whether or not the will was contingent is as follows:

"* * * There was no evidence impeaching this will, except what appears on the face of it, and is rested entirely on the introductory part of it. It begins in this manner: *'Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament,' etc.*

"And it is contended that the condition upon which the instrument was to take effect as a will, *was his*

dying on the journey, and not returning home again. But such is a very strained construction of the instrument, and by no means warranted. It is no condition, but only assigning the reason why he made his will at that time. *But the instrument's taking effect as a will is not made, at all, to depend upon the event of his return or not from his journey.* There is no color, therefore, for annulling this will on the ground that it was conditional. * * *''

In *Wilson et al.* v. *Higgason et al.*, 178 S.W.(2d Ark.) 855, the propounded instrument was a letter dated March 10, 1929, and mailed to the addressee, and the material part thereof read as follows:

"* * * 'I want you, in event that I should die any time soon, to collect all my insurance and if I have any money left anywhere I would want you to get it all together and divide it equally * * *' " etc.

The author of the letter died September 8, 1941, more than 12 years after the letter was written, and the court cited *Walker* v. *Hibbard*, 215 S.W. (Ky.), 800, and concluded as follows:

"* * * we are of the opinion that the writing here offered was properly rejected for probate as a will for the reason it was a contingent or conditional will, wherein the contingency or condition did not happen as provided therein. Contingent wills are those 'drawn to take effect only upon the happening of a specified contingency; * * * Such a will is operative if the contingency happens or occurs, but its operation is defeated by the failure or non-occurrence of such contingency, * * *.' 68 C.J. Sec. 256, D. In 28 R.C.L. P. 166, Sec. 121, it is said: 'A conditional or contingent will is one to become effective upon the happening of a specified condition or contingency. When a will is limited in its operation by conditions that defeat it before the death of the testator it is void unless re-

published by the testator. Once defeated by its own limited conditions, its mere possession and preservation by the testator until his death does not amount to a republication.' "

Where the word "if" is used in a testamentary instrument, as in the case at bar, to introduce a specifically stated condition or event, the word must be held to mean "in that case" and to express the condition or event which must arise or occur as a condition precedent to the operation of the instrument as a will, is the holding of all the authorities.

Noting that the letter in the case at bar is an "if" letter, and specifically states: "in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher to help him in his education," we present as controlling authority cases directly in point holding that such letters are contingent and not entitled to probate as follows:

In *Morrow's Appeal,* 9 Atl. Rep. (Pa.) 660, the controlling question was as to whether a holographic will, which in the first sentence stated: *"I am going to town with my drill and i aint feeling good and in case if i shouldend get back do as i say on this paper, * * *" was contingent and conditioned on testator not returning.* The testator returned home and did not die until later and the court held that the will was not entitled to probate. In so holding the Supreme Court of Pennsylvania quotes at length the opinion of the orphans' court refusing probate to the said instrument, which cites and quotes at length from many prior opinions, *Jarmin on Wills* (5th Amer. Ed.) 28, and

Walker on Wills, Section 257, and holds and concludes therefrom as follows:

" '*The foregoing cases illustrate very fully the difference between the contingency which furnishes the occasion or motive, and is given as the reason for making the will at that particular time, and the contingency upon which the instrument is to take effect,— the contingency which must happen before the instrument becomes a will at all.* It is the certainty of death, and the uncertainty of the time thereof, that leads to the making of a will. The undertaking of a perilous journey, or the probable exposure to more than usual accidents, may furnish the occasion for making a will at a particular time; but, although the time of making has been hastened by the apprehension of danger, the testator does not consider the instrument inoperative, or regard any further disposition necessary merely because the danger has been survived. *When, however, the ordinary uncertainties of human life have not been carefully provided against, and circumstances may now postpone the opportunity for doing so, a crude instrument of testamentary character is sometimes made to bridge over the chasm, and become operative only upon some designated contingency, which shall prevent the execution of a maturely considered will.*

" 'It is objected by his administrators, against the writing left by Thomas W. Morrow, that it belongs to this latter class; that it is a contingent will; and, the contingency not having happened, that the will is void. *They rely upon the Case of Todd's Will,* 2 Watts & S. 145. And it was upon the authority of that case that the register refused admission to probate. The will of George Todd began as follows: ' '*My wish, desire, and intention now is that, if I should not return, (which I will, no preventing Providence,) what I own shall be divided as follows,*' etc. " 'Chief Justice GIBSON refers to the cases of *Parsons* v. *Lanoe* (1 Ves. Sr. 190) and *Sinclair* v. *Hone* (6 Ves. 608), * * * in which the wills were held to be contingent.' '*But,*' he says, ' '*an intention to make the operation of*

the papers eventual is not near so apparent in either of these cases as it is in the one under consideration;' ' and the judgment of the court below refusing probate was affirmed. In the case at bar, we think the will illustrates both sorts of contingency: *that which urged to the present making of the instrument, and that upon which the instrument itself was to take effect. ' 'I am going to town with my drill and I ain't feeling good,' ' was the contingency suggesting the propriety of making the will. ' 'And in case if I shouldend get back do as I say on this paper,' ' contains the contingency upon which the will should become operative.* It is very clear that the will is not *presently operative.* He does not say, ' 'I hereby give and bequeath.' 'There is no immediate gift. He does not say absolutely, ' 'Do as I say on this paper.' ' *Some* time, at least, *must* elapse after his departure for town before any such duty is imposed. The command is provisional: ' *'If I shouldend get gack do* as I say on this paper.' ' It is plain *that his failure to return* is the condition precedent required before the instrument can become effectual. *If it was ineffectual until there was a failure to return, and if there was no such failure, it is also plain it never became effectual; that it was a contingent will, and became void by the non-happening of the contingency.*

" 'In Todd's will the expression is: ' 'If I should not return, what I own shall be divided as follows.' ' In Morrow's will the expression is: ' 'If I shouldend get back do as I say on this paper.' 'If I should not return,' ' and ' 'if I shouldend get back,' ' are forms of expression so plainly equivalent that we are unable to see any distinction or difference between them.' "

It will be noted from the above that this *Morrow case* is perfectly in point in the case at bar, and the urge for writing the letter was the planned operation, and the contingency upon which the gift was to take effect was specifically stated.

It was shown in *Todd's Will* (1841), 2 Watts & S. (Pa.) 145, cited and quoted in the above *Morrow case,* that the testator, in contemplation of a journey to another state to recuperate in health, made a will reading, in part, as follows: *"My wish, desire, and intention now is that if I should not return (which I will, no preventing Providence) what I own shall be divided as follows."* The testator returned in bad health, but able to attend to business, and died about a month later. The court refused probate of the will, holding that it was contingent and not intended to operate in the event of the testator's death at home.

It appeared in *Sinclair* v. *Hone* (1802) 6 Ves. Jr. 607, 31 Eng. Reprint, 1219, that a man residing with his wife in Dominica, in contemplation of a trip to England, executed a codicil reading as follows: *"In case I die before I join my beloved wife, I leave to her all my property," etc.* It appeared that the testator missed the boat, returned to his home, and lived with his wife until they both together left the island for England. Subsequently, the testator died in Corsica. The court held that the codicil was contingent and never took effect, since the testator rejoined his wife.

In re: Poonarian's Will, Marlowe et al. v. *Illwanian et al.,* 224 N.Y. 227, 137 N.E. 606, a case perfectly in point in case at bar, the court held the will was contingent and not entitled to probate. The instrument was properly executed as a will, but the bequests therein stated were preceded by the language: *"if anything happens to me in Con-*

stantinople or in ocean." In the opinion it is stated and held:

"* * * The contestant is a half-brother, who claims that upon the face of the instrument it is clearly conditional, and that, the condition not having happened, the paper is no longer a will.

"In our judgment this will was to take effect as the last will and testament of Hagop Poonarian *only in case anything happened to him while on his trip to Constantinople. As he returned to his home in Rochester in safety and the condition was never met or fulfilled, this paper ceased to be a will, and was not the will of Poonarian at the time of his death in 1920.* We are led to this conclusion by the few simple rules which govern matters of this kind. In the first place it is an underlying principle that we must take what the maker himself says in the instrument, without changing language, punctuation, or grammar to carry out what we may think was intended. Safety lies in giving to the words used by the testator their natural and everyday meaning, and stopping here if they be intelligible. In this supposed will, we find Poonarian stating that his property consists of rugs which he gives, share and share alike, to his four sisters 'if anything Happen to me in Constantinople or in ocean.'

"* * * The *word 'if' is used to introduce a condition or supposition. It means 'in that case.' No word that I can think of more clearly expresses a condition which may arise unless the word 'condition' itself is used.* The testator could have said 'in case anything happens to me in Constantinople or on the ocean' or he could have said 'on condition that anything happens to me in Constantinople or on the ocean,' but these phrases all mean the same thing, and in our judgment clearly indicate that the testator intended to give his rugs in the storehouse to his sisters only in case he died on his trip to Constantinople. * * *

"As this alleged will specifies the particular journey which was to be undertaken, and gives no indication on its face of

a general disposition to be made of the testator's property in any event, we are inclined to think that the mention of the trip to Constantinople was not merely an inducement for the making of a will, a suggestion or reminder to the testator of the uncertainty of life, whereby he disposed of his property in any event, but was mentioned as a contingency, a chance that he might meet death on the trip, in which case he willed his property."

In support of this construction and holding that the will was contingent and not entitled to probate the court cites:

Eaton v. *Brown,* 193 U.S. 411, 24 Sup. Ct. 487, 48 L. ed. 730;
Alexander's Commentaries on Wills, Sec. 106, 113;
Maxwell v. *Maxwell,* 3 Metc. (60 Ky.) 101;
Dougherty v. *Holscheider,* 40 Tex. Civ. App. 31, 88 S.W. 1113;
Oetjen v. *Diemmer,* 115 Ga. 1005, 42 S.E. 388;
Robnett v. *Ashlock,* 49 Mo. 171.

In re: *Cook's Estate,* 150 Pac.(Cal.) 553, three letters were propounded for probate, the lower court admitted same to probate, and the appellate court affirmed the decree. As to the material parts of the letters the court in the opinion states:

"* * * In the letters the deceased uses the expression, 'If I should die from the operation,' and 'In case I do not live through the operation,' and 'I have reason to believe I will not live through it,' and the instructions are to be carried out 'only in case I do not live' and 'I want you to see it is done in case of my death only.'

"As to the operation: The deceased went to the hospital on April 26, 1915, and the next day an opera-

tion was performed on her. When she was taken to the hospital she was in a weak and debilitated condition. She did not at all improve after the operation; she never recovered her strength, but grew gradually weaker. After remaining three weeks in the hospital, she was taken home, where she still continued to fail, and a week afterwards, on May 26, 1915, she died, just a month after the operation was performed. * * *"

The court held that the death of the testator came within the condition stated in the letters as follows:

"* * * The operation, however, did not relieve her from the fatal disease with which she was afflicted; she did not recover from it as a result of the operation, but died directly from it. This was the event or condition she had in mind, the happening of which was to make the letters effectual as her last will—a failure to recover from her disease under an operation, and her death from the disease notwithstanding it—a condition which the trial court found to have occurred, and which we are satisfied may not be disturbed."

Thus the language of the letters in this *Cook case* is identical in meaning and legal effect with that in the letter propounded in the case at bar, and that the above opinion is perfectly in point is obvious.

In *Oetjen* v. *Diemmer,* 42 S.E.(Ga.) 388, the question was as to whether the will was contingent upon the happening of the events named therein, and the court held the will to be so contingent and not entitled to probate. In the opinion the courts states:

"* * * The will, in so far as at present material, was as follows: '(5) If my wife and myself should perish at sea in going to or returning from Germany, I give, devise, and bequeath to my nephew William Henry Oetjen (son of my brother, Joseph), and his

heirs, forever, my house and lot (describing it) in the city of Augusta, Georgia.' etc.' '(7) Should my wife survive me, I devise and bequeath to her, during her natural life, the house and lot mentioned in the preceding 5th item of this, my will, and at her death it is my will that said house and lot shall vest in my nephew William Henry Oetjen, if living, and, if not, in his children,* * *' etc., 'This will was executed in 1878. Neither the testator nor his wife perished at sea. The wife died on or about January 21, 1899, while the testator lived until January 27, 1900. * * *'

"* * * As the contingencies did not occur, these items are inoperative. As to what the testator desired in case of the failure of these contingencies the will is silent, and we are left to conjecture alone, unless the testator's silence be evidence that he desired the law to take its course as in case of an intestacy. After a careful study of the will as a whole, we are convinced that the decision below was correct, and that the disputed items were all dependent upon the contingencies expressed in them, and that all of these items failed because of the failure of the contingencies."

In *Maxwell* v. *Maxwell* (1860) 3 Met. (Ky.) 101, it appeared that one had escaped from a steamboat wreck on the Mississippi river, on reaching land, immediately wrote a letter to his wife, detailing the hardships undergone and using, near the end, the following words: "The ice is still running very bad in the river. I can't say when I will be able to get off from here, but I hope soon, as the weather seems to be moderating. The river is very low, and navigation is very dangerous. *If I never get back home, I leave you everything I have in this world.*" This letter was received by his wife, and the writer himself eventually arrived home, but was a short time later murdered by his slaves. The letter was offered by the wife for probate, but

was refused, the court holding that it constituted a contingent will, saying: "It seems to us that the conclusion is inevitable that Maxwell did not intend the writing before us to be his will, except in the event of his never getting back home. Whether it was eventually to take place as his will, or not, was made by him, in his own words, *to depend on the happening or not happening of that particular event.* Here was a contingency—a condition. The only question remaining is, did it happen? It did not. The result is that the paper never was the will of Maxwell." In commenting on *Massie* v. *Griffin* (1859) 2 Met. (Ky.) 364, the court said: "The writing in this case is unlike that which was established as the will of Massie, in the case of *Massie* v. *Griffin* (Ky.) *supra,* decided at the summer term, 1859, of this court. *In that case it was decided that the condition was limited to a single provision of the will, and was not applicable to the entire writing, and it was not therefore a contingent will.* But here that portion of the writing claimed to be a testamentary instrument is made in such terms as to render it totally dependent on a contingency whether it shall ever become a will. The contingency applies to the entire disposition. The two cases are, therefore, not analogous."

Walker v. *Hibbard,* 215 S.W. (Ky.) 800, is a leading case cited in many decisions and holds:

> "A will, so phrased as to clearly show that it was intended to take effect only on the happening of the particular event set forth as the reason for writing it, is contingent."

The purported letter in the material part states:

> " '* * * I do not anticipate any trouble, but no one never knows. If anything should happen to me, I want you to please to do this for me. See that everything I have in the world goes to George B. Gomersall. * * *' "

As stated in the opinion the probation of the letters was contested on the ground:

> "* * * that the paper was a contingent will, and void as a final testamentary disposition because the contingency upon which it was to become effective never happened.
>
> "It is upon this last-named ground that the paper was rejected, and its probate refused by the circuit judge, who heard and disposed of the case.
>
> "It is conceded that Mrs. Long completely recovered from the operation to which she was about to submit when the paper was written, and died six months later from cause entirely independent of and having no connection with the operation itself or the ailment to relieve which it was performed. * * *"

In the opinion many cases are examined and differentiated including *Massie* v. *Griffin,* 2 Metc. (Ky.) 364; *Maxwell* v. *Maxwell,* 3 Metc. (Ky.) 101; *Bradford* v. *Bradford,* 4 Ky. Law, 947; *Forquer's Estate,* 216 Pa. 331, 66 Atl. 92; *Eaton* v. *Brown,* 193 U.S. 411, 24 S.Ct. 487, 48 L. ed. 730; *Kelleher* v. *Kernan,* 60 Md. 440; *Skipwith* v. *Cabell,* 19 Grat. (Va.) 758; *Redhead* v. *Readhead,* 83 Miss. 141, 35 So. 761; *French* v. *French,* 14 W. Va. 458; *Cody* v. *Conly,* 27 Grat. (Va.) 313; *Dougherty* v. *Dougherty,* 4th Metc. Ky. 25; *Morrow's Appeal,* 116 Pa. 440, 9 Atl. 660, *Dougherty* v. *Holscheider,* 40 Tex. Civ. App.

31, 88 S.W. 1113; *Magee* v. *McNeil,* 41 Miss. 17; *Hamilton's Estate,* 74 Pa. 69, and the Principles and Rules 1 to 3 stated on Pages 24-25, *supra,* are stated, exhaustively discussed and approved.

The court then reasons and holds:

> "Looking now again to the paper in the light of the authorities referred and the principles announced by which we are to be guided in ascertaining the class in which it should be put, we are convinced by the paper itself, without the aid of extrinsic evidence, that if a person not versed in the law of wills can write a contingent will Mrs. Long intended in writing this letter that it should have no effect if she survived the operation she was about to submit to, and was only written to provide against the fatality that might follow it.
>
> "If she had said in the letter, 'I only intend this disposition of my estate to be effective in the event I do not survive the operation I am about to submit to,' it would not manifest her purpose in writing it more clearly than the words she employed."

In *Lee* v. *Kirby,* 217 S.W. (Ky.) Page 895, the court held:

> "Where an instrument is a contingent will and the condition upon which it was to become effective has failed, it cannot be admitted to probate."

In discussing the holding the court cites with approval *Walker* v. *Hibbard, supra,* as follows:

> "This court but recently, in the case of *Walker, Adm'r,* v. *Hibbard,* 185 Ky. 795, 215 S.W. 800, after a careful consideration of the authorities, laid down the rules for testing a will to determine whether it is conditional or permanent. * * *"

In the recent case of *Ellison* v. *Smuts,* 151 S.W. (2d) (Ky.) 1017, the rules of construction and classification of

testamentary instruments as being contingent, or otherwise, as hereinabove stated are approved.

In *Watkins et al.* v. *Watkins' Adm'r.*, 269 Ky. 246, 106 S.W.(2d) 975, relied upon by appellee the will propounded contained the following opening statement:

> " 'Lexington, Kentucky, July 2nd, 1926.
>
> " 'In view of my trip to Kansas City, Missouri, for a short visit, I am leaving this memo Will in case of my passing away for any reason. * * *"

The testator died on December 1, 1929, some three years after his return from said trip. The court in the opinion states:

> "It is the contention of counsel for appellees that the first sentence of the instrument does not render the will conditional or contingent, but that testator was merely narrating an approaching event as an inducement for the making of the will. One of the leading cases bearing on conditional or contingent wills which has been widely cited and quoted is *Walker et al.* v. *Hibbard,* 185 Ky. 795, 215 S.W. 800, 805, 11 A.L.R. 832. * * *"

After citing and quoting with approval from the opinions in the *Dougherty* v. *Dougherty,* 61 Ky. 25, and *Walker et al.* v. *Hibbard,* 185 Ky. 795, 215 S.W. 800, the court states and holds:

> "* * * In the *Dougherty case* it is clearly manifest that testator had in mind and was making provision against death that might occur as a result of the specific thing assigned as a reason for making the will; and in *Walker* v. *Hibbard,* the approaching operation was recited as the inducement for making a will, and it was clearly providing against death that might occur as a result of the operation at the hospital. But in the

> instrument under consideration, the expression *'in case of my passing away for any reason' apparently does not refer solely to death during or as a possible result of the trip to Kansas City, but is general in its nature and brings the case within the general rule referred to in Walker* v. *Hibbard that where the reasons assigned for writing the will are general in their nature and it does not clearly appear that it was intended to be operative only during a certain period or until a certain emergency had passed, the will is permanent and not contingent. * * *"*

It is obvious that this case holds directly against the contention of the appellee that this "if" contingent letter in the case at bar is not a contingent will. The opinion specifically approves the principles and rules of construction and classification, presented above, under which such "if" wills must be held to be contingent, but holds that a will which states that same shall be operative *"in case of my passing away for any reason,"* is not made contingent on any specific occurrence or event as in the letter in the case at bar. It will be observed that all the cases relied upon by the appellee, and same are herein presented, do not present testamentary instruments which are specifically made so contingent.

In *Damon* v. *Damon* (1864) 8 Allen (Mass.) 192, it appeared that a will made in contemplation of a voyage commenced as follows:

> "I, J. W. Damon of Charlestown, in the county of Middlesex, commonwealth of Massachusetts, being in sound mind and body, and being about to go to Cuba, and knowing the dangers of voyages, do hereby make this as my last will and testament, in manner and form following: First, *If by casualty or otherwise I should*

lose my life during this voyage, I give and bequeath to my wife Ann," etc.

In the second and third clauses, the testator devised certain property to his nephews. The testator made the voyage, returned safely, and later died at home. The court held that the will was contingent as to the first clause, but should be admitted to probate as to the remainder.

In *Robnett* v. *Ashlock* (1872), 49 Mo. 171, the testator prefaced his will by the following words:

> *'I this day start to Kentucky; I may never get back, if it should be my misfortune, I give my property to my sisters' children,'* etc. The court held that the words referred to imported a condition on the fulfillment of which the will was to become operative, and that when the testator returned alive from Kentucky the will was void and inoperative, saying: 'The paper under consideration is awkwardly drawn, but its purport seems to be clear. Had the language been, 'I this day start for Kentucky; I may never come back; I therefore give,' etc., the language would only express the occasion of making the will, and the bequest would be absolute. Or if, after expressing the doubt about his return, he had said, 'Lest I should not return,' or words to that effect, 'I give,' etc., he might in that case be considered as merely expressing his sense of propriety of making a will, without intending to make the disposition of his property contingent upon his not returning. I take the words after the first phrase to mean, *'If it should be my misfortune never to get back,'* or *'If I die during my absence, I give,'* etc. *It is not easy to attach any other meaning to them, and with that meaning the bequest is made conditional upon his not returning, and could only become operative upon the contingency of his dying before his return.'*

In *Davis* v. *Davis*, 65 So. (Miss.) 241, the letter propounded contained the statement:

"Should I not get over this operation, I want you and Papa to take charge of everything i've got, sell my pool room for about $500.00 at least, and I have $800.00 in the M. & F. Bank of Amory, and a Frisco check of $75.00 due on the 15th, and you know what I have in Columbus. My B. R. T. money is now delinquent and you cannot get that, but I have nearly got it straightened up again. * * *"

In the opinion it is stated:

"That said Henry J. Davis recovered from his operation and returned to work as an employee of said railroad company, and, while in the employ of said company and engaged in his duties, he was killed by a train of said railroad company; his death being alleged to be due to the negligence and carelessness of the servants of said railroad company. * * *"

The court held:

"* * * that deceased did not intend to make an unconditional bequest of his property, but only a bequest to take effect if he should not recover from the operation.

"Construed in the light of these facts, it is clear that he did not intend to make an unconditional bequest of his property, but one to take effect only in the event he 'should * * * not get over' the operation he was then about to undergo. * * *"

In re: *Young's Estate*, 95 Okla. 205, 219 Pac. 100, it was held that a letter which stated "if I should die first, I want you and your heir to have what I have left" presented for probate was a holographic will. The trial court probated said letter as such. The addressee of the letter died before its author, but the heir of the addressee survived the author. On appeal the Supreme Court of Okla-

homa held that the letter should have been held not to be a will and probate refused, and further held:

> "We think the instrument must be denied probate for a further reason, even though it was intended as a testamentary disposition of her estate. If a will at all, it is a conditional will, and if the event upon which it is conditioned does not transpire, the will fails. *Dougherty* v. *Holscheider,* 40 Tex. Civ. 31, 88 S.W. 1113; *Du Dauzay* v. *Du Sauzay,* 105 Miss. 839, 63 S. 273; *In re: Whitaker,* 219 Pa. 646, 69 Atl. 89; *Walker* v. *Hibbard,* 185 Ky. 795, 215 S.W. 800, 11 A.L.R. 832; *Dougherty* v. *Dougherty,* 4 Metc. (Ky.) 25; *Robnett* v. *Ashlock,* 49 Mo. 171 * * * (101 219 P)."

The writer of the brief has diligently searched the decisions of American and English Appellate Courts, reference and textbooks, and the above are the leading cases in point in the case at bar, and no case or authority has been found holding that where the word "if" is used in a testamentary instrument, as in the case at bar, to state a specific condition or event as a condition precedent to the operation of the instrument, the instrument is not contingent, and should probated. It is believed that no such case or authority exists.

AUTHORITIES RELIED UPON BY APPELLEE

Cases relied upon by counsel for the appellee, some of which have been hereinabove presented in this brief, and the remainder are hereinafter presented, are not in point in the case at bar in that in said cases the pertinent language of the testamentary instruments involved did not specific-

ally introduce the arising or occurrence of a specific condition or event as a condition precedent to the operation of the instrument as a will, as did the letter presented in the case at bar, and in each of the cases relied upon by appellee, the court approves the principles and rules hereinabove presented, but points out the fact that the wills involved were not conditioned upon a specific condition or event, and differentiates the cases being decided from cases based upon instruments which express specific contingencies.

In the cases of *Watkins* v. *Watkins, Adm.,* 106 S.W. (2d) Ky. 975, (Pp. 47-48, *supra*); *In re: Forquer's Estate,* 66 Atl. (Pa.) 92, (Pp. 27-33, *supra*); *Ferguson* v. *Ferguson,* 44 S.W.(2d) Tex. 1096, (Pp. 28-30, *supra*), relied upon by the appellee are presented, *supra,* in this brief on the pages stated. The remaining cases relied upon by appellee are as follows:

In *Eaton* v. *Brown,* 193 U.S. 411, 24 S.Ct. 487, 48 L. ed. 730, relied upon by proponent, *the instrument presented for probate was in form and substance a general will and not in the form of a letter,* and the death of the testator occurred within four months after its execution, without change in the residence or family status of the testator. The will in its entirety read:

"Washington, D.C. Aug. 31"/001.

"I am going on a Journey and may, not ever return. * * * All I have is my *one* hard earnings and and I propose to leave it to *whome* I please."

Considering the fact that this instrument was a *will* and not a *letter* written to meet a *current crisis,* specifically stated sudden, and that the will closed with the statement "All I have is my *one* hard earnings and I propose to leave it to *whome* I please," which clearly, as the court states, disclosed the intention of the testator that the bequests therein were not temporary or contingent, the court reasoned as follows:

> "* * **This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property; not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty—an hypothesis which is to the last degree improbable in the absence of explanation—it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which, on the face of it, has reference to an unconditioned gift."**

The court then cites with approval many of the cases presented above holding "if" wills to be contingent when same refer to a specifically stated condition, event or state of facts, as a contingency, and in differentiating the holdings in said cases the court in the opinion pointed out that the classification was different where the language used more clearly reflected the contingent nature of the instrument.

In holding the said Will proveable the Court stated:

> "* * * The only question, therefore, is whether the instrument is void because of the return of the deceased from her contemplated journey. *As to this, it cannot be disputed that grammatically and literally the words 'if I do not' (return) are the condition of*

> *the whole 'last request.'* There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention, to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the court is of opinion that the will should be admitted to proof."

It thus appears that the opinion in this *Eaton case* approves the rule that testamentary instruments which introduce a specific condition or event as a condition precedent to their operation, are contingent, but held that the language of the will involved in the case did not make the operation of the will contingent on the happening of a specific event, and contained the quoted statement which evidenced the fact that the will was intended to be general and not contingent, and for those reasons was not contingent. It is clearly apparent that this *Eaton case* is against the contention of appellee that the letter in the case at bar should be probated, since the pertinent language in said letter is "in case I die if they do operate I bequeath you my belongings," etc., which is a specific statement of the events which are clearly made contingent upon the operation of the gift in the letter.

In re: Tinsley's Will, 174 N.W. (Iowa) 4, relied upon by appellee, the propounded instrument was a duly

executed will, the opening sentence of which in material part is as follows:

" 'Des Moines, Ia., Sept. 2—15.

" 'In case of any serious accident, after my just debts are paid, I direct that * * *' " An objection to the probation of the will was: "Said instrument, which is alleged to be a will, rests upon a contingency or the happening of an event, and refers to some future contingent event, which did not take place, and said instrument is therefore ineffective as a will."

The court held that the word "accident" meant death, and concluded and held as follows:

"* * This position is taken on the strength of the introductory phrase of the instrument, 'In case of any serious accident,' etc. *From this expression, and from the fact appearing in evidence that the deceased was about to leave upon a trip to California, the court is asked to say that his intention in making the instrument was that it should become effective only in the event of his death while upon the contemplated trip, an event which concededly did not happen.* **In other words, counsel would have us construe the writing as if it read, 'I am about to make a trip to California, and if, by reason of any accident, I do not live to return to my home, then, and in that event, I dispose of my estate as follows,' etc. But to do this the court must make a will for the testator, expressing an intent which is not to be found in the writing which he executed. * ***

*"In the case before us the fact that the deceased was about starting on a journey is not mentioned in the instrument, and the fact comes into the record only by the testimony of witnesses examined in the proceedings for its probate. * * **

"It may well be that the contemplation of a long journey, and its possible dangers and exposures, suggested to the mind of the deceased the wisdom of providing for the succession to his estate in the event of

his death, and that acting upon this thought he prepared the paper in question. *This would indicate no more than that the circumstances mentioned were the occasion for his act, and not at all that his death while on that trip was a contingency without which the will would not become operative.*"

In this opinion the controlling principles and rules for the construction and classification of testamentary instruments, as to being contingent or general, hereinabove, presented, are stated and approved; however, they are held inapplicable for the reason *that the pertinent language used in the will only meant that in case of my death,* without stating a specific event. It is obvious that the will was not contingent on the death of the testator on a journey which was not referred to in the will.

Barber v. *Barber,* 13 N.E.(2d) Ill. 257, cited and relied upon by appellant herein, is against the contention that the letter herein involved should be probated and supports the above stated principles and rules under which its probate should be denied. The two letters involved in material part stated:

" 'June 27, 1932

" 'To whom it may concern:

" 'I am leaving for New York State this morning, and if anything should happen to me I request that everything I own both personal and Real be given to my sister Miss May Barber. * * *

" 'Decatur, Ill.,
June 11, 1932.

" 'To whom it may concern:

" 'It is my desire to make a will in legal form and file away, but until I do I will expect this to be my will. * * *' "

The court held *that the language used did not even intimate that the bequest was contingent on the death of the testator on said trip and to the contrary one of the letters clearly states that until a will is prepared in legal form and filed away, said bequests should be in full force and effect.*

After approving the principles and rules presented in this brief, the court cites and discusses practically all the cases cited in this brief and held:

"We hold that the will of Fred Barber is not conditional or contingent. *The introductory words, 'I am leaving for New York State this morning, and if anything should happen to me,'* merely state the occasion inducing the making of his will on the particular day it was executed. Testator did not qualify the quoted language by adding, 'on my journey to New York,' and we cannot, under the guise of construction, interpolate such words in order to infer a contingency and thereby frustrate a clearly expressed legal intention. The extrinsic evidence admitted on the application for probate confirms the unconditional character of the testamentary disposition and in no way even tends to vary or control the operation of the language employed in the will."

In *Merriman* v. *Schiel,* 140 N.E. (Ohio) 600, relied upon by the appellee, the holding in so far as applicable to the facts in the case at bar is against the probation of the letter presented here. The letter in this *Merriman case* in material part states:

" 'I assert that I am in good health and of sound mind at the time of writing this testament * * *

" 'This in case that I meet with accident on this journey these lots by Augus and George as atmistrer.' "

It is noted in the opinion that the testator specifically designated the instrument as "my last will," and that the concluding sentence relating to the journey was not of a dispositive nature and was not intended to effect the operation of the will. In holding the will not to be contingent the court reasoned and held:

> "* * * *The will takes effect at the time of the death of the testator, and some light may be thrown upon the testator's intent by inquiring whether the conditions and circumstances surrounding the testator were practically the same at the time of his death as at the time of the execution of the will. So far as this record discloses no change appears.* There is nothing in the will itself, nor are there additional facts in the record to indicate that an accident during the course of his journey to Montana, or within a reasonable time thereafter, would have had any reasonable or logical relation to his property or to the objects of his bounty * * * *The testator having retained the will in a safe place in his own home for more than a year after the danger of his journey had passed, without revoking the same, the courts should not lightly do after his death that which he had abundant opportunity to do in his lifetime."

In the case at bar the letter propounded for probate was written approximately 13 years before the death of its author, and its operation was specifically conditioned "in case I die if they do operate, I bequeath," etc., and neither the operation or death occurred, and the letter was kept by the addressee and never mentioned or referred to by the author or the addressee, and during said period of 13 years after the letter was written the author engaged in business

in Alaska for 11 years and resided in Oklahoma for three years until his death July 8, 1944. While on the other hand in this *Merriman case,* as the court states in the opinion, the language used was not dispositive or contingent, it is clear that the opinion in this *Merriman case* has no application to an "if" testamentary instrument.

In re: Moore's Estate, 2 Atl.(2d) Pa. 761, relied upon by the appellee, does not support the contention that the will presented in the case at bar should be probated, and the holdings in the cases of *Morrow's Appeal,* 9 Atl. (Pa.) 660, Pp. 36-38, *supra,* and *Forquer's Estate,* 66 Atl. (Pa.) 92, Pp. 30-33, *supra,* are cited and approved. In the opinion in this *Moore's Estate case the court directs attention to the fact that the will is not contingent upon the occurrence of a specific event* and states:

> "* * * While the paper might have been less ambiguous if testatrix had punctuated it, we must deal with it as it appears in the record; *its ambiguity requires consideration of the circumstances in which it was written.* We think her reference to the proposed trip to Cincinnati was intended as an explanation why, at that time, she made her will, to be effective whenever she might die, unless, of course, she revoked it; *instead of revoking it, she retained it until her death twelve years later. Her conduct supports the inference that she did not wish to die intestate."*

In re: Langer's Estate, 281 N.Y.S. 866, relied upon by the appellee, is likewise not in point, *and the court holds that the will involved did not make a specific event the contingency upon which same would operate and approved the holding. In re: Poonarian's Will* (Pp. 39-40, *supra*), as follows:

*"Here the condition, if it can be called one at all, is not attached to the substance of the gift. The court is of opinion that the quoted language, no matter which translation is accepted, does not constitute a condition. It is merely a statement of the inducement which led to the writing of the instruments. There is not to be found in it the statement of a specific hazard or of a specific contingency such as was found In re: Poonarian's Will, 234 N.Y. 329, 137 N.E. 606, upon which contestants rely. * * *"*

It thus appears the cases relied upon by appellee in the District Court to support the contention that the letter involved in the case at bar should be probated did not present testamentary instruments, the operation of which was directly made contingent on the occurrence of a specifically stated event, *and, that in the opinions in said cited cases the rules presented on Pp. 24, et seq., supra, under which the letter presented in the case at bar must be held contingent, were approved.*

Where, as in the case at bar, the language of the testamentary instrument is plain and clear, both in its expression and in its meaning, the application of rules of construction is unnecessary.

McDonald v. *Cleremont*, 153 Atl. (N.J.) 601, and cases cited.

In re: Clark's Estate, 284 Pac. 231, 103 Cal. App. 243;

Citizens' & Southern Nat. Bank v. *Clark*, 158 S.E. 297, 172 Ga. 625;

Foss v. *State Bank & Trust Co.*, 175 N.E. 12, 343 Ill. 94, affirming *State Bank & Trust Co.* v. *Foss*, 257 Ill. App. 435;

Bireley's Adm'rs. v. *United Lutheran Church in America,* 39 S.W. (2d) 203, 239 Ky. 82;

Low v. *First Nat. Bank & Trust Co. of Vicksburg,* 138 S. 586, 162 Miss. 53, 80 A.L.R. 112;

White v. *Weed,* 175 A. 814, 87 N.H. 153;

In re: Blanch's Will, 214 N.Y.S. 565, 126 Misc. 421;

In re: Barrett's Estate, 253 N.Y.S. 658, 141 Misc. 637;

In re: Watson's Will, 258 N.Y.S. 755, 144 Misc. 213, modified 262 N.Y.S. 394, 237 App. Div. 625, modified 186 N.E. 787, 262 N.Y. 284;

Williams v. *Best,* 142 S.E. 2, 195 N.C. 324;

Fields v. *Fields,* 3 Pac. (2d) 771, 139 Or. 41, rehearing denied 7 Pac. (2d) 975, 139 Or. 41;

In re: Bumm's Estate, 159 A. 15, 306 Pa. 269;

Conner v. *Everhart,* 169 S.E. 857, 160 Va. 544;

In re: Weed's Will, 252 N.W. 294, 213 Wis. 574.

The rule of presumption against intestacy cannot be used to justify a revision of the clear language of a will, and the court, under the guise of construing a will, will not write a new will, and what the testator says in the instrument must control, and the court must not construe the language used to cause same to express what the testator did not intend.

The above is the substance of the syllabus in *Glover* v. *Reynolds,* 37 Atl. (N.J.) 90, and in the opinion the court reasoned and held:

"It is argued in the briefs that the intention of the decedent 'can be spelt out, and it logically appears to be: ' 'In the event that my husband die' ', or in other words, 'if my husband does not survive me, I give and bequeath,' etc. This argument is based on the premise that the testatrix did not intend to die intestate. The rule of presumption against intestacy, however, cannot be used to justify a revision of the clear language of the will. *Federal Trust Co.* v. *Ost.*, 120 N.J. Eq. 43, 183 A. 830, affirmed 121 N.J. Eq. 608, 191 A. 746.

"* * * In the case of *McDonald* v. *Clermont*, 107 N.J. Eq. 585, at Page 589, 153 A. 601, 603, the Court of Errors and Appeals adopted as its own view the following language of Vice Chancellor Buchanan: ' * * * he did not say it in his will, and this court cannot say it for him. It is regrettable, but after all it is the testator's own fault. The law throws all possible safeguards about the execution of a will, so a man may be sure that his property will go in accordance with what he provides in his will; but the law cannot—or at least does not—compel a man to have his will drawn by some one who knows how.' "

Of course, in the case at bar the author of the letter clearly and specifically stated what the will intended. The language of the letter is good clear English, and evidences the fact that the author was a man of considerable education and experience.

The following cases support the above proposition:

In re: Hoytema's Estate, 181 Pac. (Cal.) 645;

Toso v. *State Bank & Trust Co.*, 175 N.E. (Ill.) 12;

Verhalen v. *Klein*, 28 S.W. (Tex.) 975;

Jones v. *Brown*, 144 S.E. (Va.) 620;

First Nat. Bank v. *Shukan*, 126 S. 409.

CONCLUSION

Without burdening the Court and this brief with recapitulation of points herein presented. we conclude with the statements:

1. That the controlling question on this appeal is one purely of law and as to whether the operation of the letter, as a will, which was written in a Washington, D. C., hospital just before a planned operation on its author was contingent and not entitled to probation as a will, where same specifically states, "In case I die if they do operate I bequeath you my belongings and property," and the author does not undergo the planned operation and does not die, but recovers and returns to his home in Alaska, and resides and engages in business there for 10 years, and then returns to Oklahoma and dies in Oklahoma three years later, and some 13 years after the letter was written.

2. That the applicable and controlling rule is that where the language of a testamentary instrument clearly conditions its operation on the happening of a specifically stated event or condition, its operation is contingent and the instrument is inoperative where the event does not occur.

3. That where the pertinent language of testamentary instruments clearly and directly condition the operation of such instrument on the happening of a specifically stated condition or event, as in the letter in the case at bar, the authorities concur in holding such testamentary instruments to be contingent upon the occurrence or happening of the stated condition or event.

4. The decree of the District Court of Alaska setting aside and vacating the judgment of the Probate Court by refusing probate to the said letter and further ordering and directing that the said letter be probated as the will of J. M. Pearl, deceased, should be reversed and vacated, and the said District Court directed to affirm the judgment of the said probate court denying probate to the said letter.

Respectfully submitted,

CHARLES E. MCPHERREN,
Perrine Building,
Oklahoma City, Oklahoma,
Attorney for Appellant.

AUGUST, 1947